No. 91-779

Supreme Court, U.S.
FILED
NOV 12 1991
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

BURLINGTON NORTHERN RAILROAD COMPANY,
Petitioner,

v.

WILLIAM D. FORD,
Respondent.

BURLINGTON NORTHERN RAILROAD COMPANY,
Petitioner,

v.

THOMAS L. JOHNSON,
Respondent.

Petition for a Writ of Certiorari to the Supreme Court of the State of Montana

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PETITION FOR A WRIT OF CERTIORARI

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Date: November 12, 1991

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether a state venue law which provides that non-resident corporations may be sued in any county in the state, whereas resident corporations may be sued only in their county of residence, violates the Equal Protection Clause of the Fourteenth Amendment.

PARTIES TO THE PROCEEDING BELOW AND RULE 29.1 STATEMENT

All parties to the proceeding below are identified in the caption of this petition.

Burlington Northern, Inc., is the parent company of petitioner Burlington Northern Railroad Company. The partially owned subsidiaries of petitioner Burlington Northern Railroad Company are:

The Belt Railway Company of Chicago
Burlington Northern (Manitoba) Limited
Camas Prairie Railroad Company
Davenport, Rock Island and North Western Railway Company
Houston Belt & Terminal Railway Company
Iowa Transfer Railway Company
Kansas City Terminal Railway Company
Keokuk Union Depot Company
Longview Switching Company
M T Properties, Inc.
Northern Radio Ltd.
Paducah & Illinois Railroad Company
Portland Terminal Railroad Company
Terminal Railroad Association of St. Louis
Trailer Train Company
The Wichita Union Terminal Railway Company

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Petition for a Writ of Certiorari to the Supreme Court of the State of Montana

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Burlington Northern Railroad Company ("BN") respectfully prays that a writ of certiorari issue to review the decision and order of the Supreme Court of the State of Montana entered in the above cases on August 12, 1991.

OPINIONS BELOW

The unreported decision and order of the Montana Supreme Court is reproduced in the Appendix ("App.") at 1a to 15a. The two unreported decisions and orders of

the Yellowstone County trial courts are reproduced respectively at 16a, and 18a.[1]

JURISDICTION

The decision and order of the Supreme Court of the State of Montana was entered on August 12, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a) (1988).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The applicable Montana venue statute, Mont. Code Ann. § 25-2-118 (1989) ("MCA"), is set forth verbatim in the Appendix at 26a. Most pertinent, subsections (1) and (2) of the statute provide that:

> (1) . . . the proper place for trial for all civil actions is the county in which the defendants or any of them reside at the commencement of the action;
>
> (2) if none of the defendants reside in the state, the proper place of trial is the county the plaintiff designates in the complaint; . . . .

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution provides as follows:

> No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const., Amend. XIV, § 1.

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[1] This litigation began as two separate cases, *William D. Ford v. Burlington Northern R.R.*, No. DV-89-974, and *Thomas L. Johnson v. Burlington Northern R.R.*, No. DV-89-975, both brought in the Montana Thirteenth Judicial District Court, Yellowstone County. Two different trial judges issued separate decisions, but those decisions were identical in substance, and the Supreme Court of the State of Montana consolidated the cases and decided them together.

STATEMENT OF THE CASE

This petition concerns the applicability of the Equal Protection Clause of the Fourteenth Amendment to discrimination in state court venue. Montana's general venue statute discriminates in a real and substantial way against out-of-state corporations—permitting suits to be filed against them in any county, while strictly limiting venue against resident corporations. The court below, finding "inconsistency" in the decisions of this Court, concluded that it was unnecessary to determine whether there was a rational basis for the disparate treatment in the state venue law. This case provides the opportunity for this Court to eliminate the perceived tension in its prior decisions, which have divided state supreme courts and resulted in extreme forum shopping within state court systems.

A. The Montana Venue System

The Montana venue system which gives rise to this case consists of three basic elements. First and most important, the applicable venue statute, MCA § 25-2-118, states that while residents of the state may be sued only in their county of residence, non-residents may be sued in any county in the state the plaintiff chooses. App. 26a. Second, under controlling state decisional law, an out-of-state corporation may not acquire "resident" status for purposes of this venue statute—even, for instance, by designating a principal place of business and an agent for receipt of service in a particular county.[2] Third, Montana maintains an "open door" policy which permits out-of-

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[2] *E.g., Haug v. Burlington Northern R.R.*, 236 Mont. 368, 770 P.2d 517, 519 (1989) (citations omitted). In *Haug*, the Montana Supreme Court also overruled another decision, *McAlear v. Kasak*, 225 Mont. 113, 731 P.2d 908 (1987), which had eliminated, through statutory construction, the "'any county' option" for tort suits against non-residents.

state plaintiffs to sue in Montana state courts, even when the alleged injuries occurred outside the state.[3]

B. The Proceedings Below

BN is a corporation organized under the laws of the State of Delaware, with its principal place of business in Fort Worth, Texas. BN operates rail lines in twenty-five states, including Montana, and has its principal place of business in Montana in Hill County.[4] As required by state law, BN has also designated a registered agent for service of process in Montana, located in Lewis and Clark County.[5]

The two underlying actions were brought against BN under the Federal Employees Liability Act ("FELA"), 45 U.S.C. §§ 1-60 (1981), each in state district court in Yellowstone County, Montana. BN has some trackage in Yellowstone County but, as noted above, its principal place of business in the state is located in Hill County. In each case below, the plaintiff was a resident of Sheridan, Wyoming, and was allegedly injured while working on BN's railroad premises in Sheridan. The lead counsel for both plaintiffs was a law firm located in Colorado.[6] Thus, the actions were brought in a selected Montana

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[3] *E.g., Haug v. Burlington Northern R.R.*, 770 P.2d at 521 (citations omitted); *State ex rel. Burlington Northern R.R. v. District Court*, 236 Mont. 368, 746 P.2d 1077, 1080 (1987); *Bevacqua v. Burlington Northern, Inc.*, 138 Mont. 237, 598 P.2d 1124, 1125 (1979); *Labella v. Burlington Northern R.R.*, 182 Mont. 202, 595 P.2d 1184, 1187 (1979).

[4] Hill County is in the far north of Montana, bordering on Canada. Yellowstone County, where the underlying actions were brought, is in the southern part of the state, four or five counties away.

[5] *See* MCA § 35-1-1012 (requirement for "registered agent" for receiving service of process).

[6] Ford and Johnson were both represented by a firm located in Aurora, Colorado, with local Montana counsel.

state court by out-of-state counsel, representing out-of-state plaintiffs, alleging out-of-state injuries.

In each case, BN moved for change of venue from Yellowstone County to Hill County, its Montana headquarters. In so moving, BN challenged the constitutionality of the Montana venue statute on equal protection grounds, claiming invidious discrimination as between resident and non-resident corporations. The Yellowstone County trial courts denied BN's venue motions, following controlling state law that "a foreign corporation has no county of residence for venue purposes and can be sued in any county selected by the plaintiff." App. 21a (citations omitted).[7] The trial courts also upheld the constitutionality of the venue statute, referring to "the hazardous conditions surrounding the railroad industry," App. 24a, and finding no disparate treatment because "[a]ll railroads incorporated in other states and doing business in Montana are treated similarly and can be sued in any county the plaintiff chooses." App. 17a, 24a.

On appeal, the Montana Supreme Court affirmed. The court declined BN's express invitation to construe the Montana venue statute so as to permit an out-of-state corporation to acquire a residence for purposes of venue. App. 5a-6a. The court then turned to the constitutional issue. Noting "some inconsistency" in the federal precedents, the court focused initially on a 1904 decision of this Court, citing it for the proposition that "the Fourteenth Amendment does not guarantee citizens the right to have disputes determined in one forum, as opposed to another." App. 6a. (quoting *Cincinnati St. Ry. v. Snell*, 193 U.S. 30, 36-37 (1904) ("*Snell*")). The court below acknowledged this Court's decision in *Power Mfg. Co. v. Saunders*, 274 U.S. 490 (1927) ("*Saunders*"), which held that the Equal Protection Clause does apply

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[7] Under MCA § 25-2-201(1), a change of venue is required only "when the county designated in the complaint is not the proper county . . . ."

to matters of state court venue and that a state venue law may not discriminate between resident and non-resident corporations. However, the court concluded that "subsequent decisions by the U.S. Supreme Court raise a question about whether *Saunders* continues to be good law." App. 11a. The court then expressed its view repeatedly that *Snell* has been revived by this Court as good law. App. 12a, 13a, 14a.

The Montana Supreme Court specifically declined to address the equal protection issue raised by BN—whether the Montana venue statute has "a rational basis for treating out-of-state corporations differently from domestic corporations . . . ." App. 9a. Instead, the court focused on a perceived federal policy, which it found to be embodied in the FELA, allowing railroad workers maximum flexibility in their choice of forum, and found that this national policy offers "a justification for disparate treatment in this case . . . ." App. 11a.[8] The decision below also found that no real discrimination arose in the operation of the Montana venue statute, because BN could have been sued in the federal district court for Montana, which sits in Yellowstone County among other places. App. 15a.[9]

REASONS FOR GRANTING THE WRIT

This case presents the question whether the Equal Protection Clause of the Fourteenth Amendment prohibits discrimination in state venue laws against non-resident corporations. The question is an important one: if states can utilize different venue provisions for out-of-state corporations, there is a temptation to permit broad venue, and hence wide-open forum shopping, against those defendants.

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[8] The Montana venue statute is of general applicability, and does not address FELA claims specifically.

[9] Section 56 of the FELA provides for concurrent state and federal court jurisdiction, and permits a defendant railroad to be sued in any federal district in which it is currently doing business. 45 U.S.C. § 56 (1981).

The opinion below exemplifies the confusion engendered by this Court's decisions concerning the application of the Equal Protection Clause to state venue statutes. The court below noted "some inconsistency in the federal case law," App. 6a, and then discussed three decisions of this Court addressing whether a state venue law violated the Equal Protection Clause. The court relied on the earliest of the three cases (*Snell*), because it doubted the authority of the central case invalidating a statute virtually identical to the one involved here (*Saunders*). That doubt stemmed from a footnote in this Court's most recent decision, which questioned the continuing validity of *Saunders*. See App. 9a (citing *American Motorists Ins. Co. v. Starnes*, 425 U.S. 637 (1976) ("*Starnes*")). As a result, the court below found it unnecessary even to identify a rational basis for the patent discrimination involved here.

In the absence of definitive guidance from this Court, the state courts have reached conflicting results as to whether, and to what extent, non-resident corporations are entitled to equal treatment in venue provisions. Some courts, following *Saunders*, have invalidated discriminatory venue provisions, some have upheld them, and some have recognized the constitutional issue but have construed their statutes to permit out-of-state corporations to acquire a residence for venue purposes. In other states, the discriminatory provisions remain in effect, but no challenge has reached an appellate court.

This issue is of great importance in the administration of the state courts. A discriminatory venue provision such as that upheld in the decision below permits rampant forum shopping against out-of-state corporate defendants. For example, over 85 percent of the cases brought against BN in Montana state court were filed in just two of Montana's fifty-six counties. Not a single one of those cases involved an accident that occurred in the county of venue.

Such forum shopping has become a potent weapon in enhancing jury verdicts against an arbitrarily dis-

favored class of defendants. Thus, review of the decision below should be granted in order to eliminate the present confusion and its highly undesirable effects.

I. THE DECISION BELOW EXEMPLIFIES CONFUSION WHETHER THE EQUAL PROTECTION CLAUSE PROHIBITS DISCRIMINATION AGAINST OUT-OF-STATE CORPORATIONS IN STATE COURT VENUE

Harking back to turn-of-the-century law, the Montana Supreme Court appears to have viewed the form of discrimination found in the Montana venue statute as beyond the reach of the Equal Protection Clause. Thus, it seems to have been assumed that because "only" venue is involved here, or because the disadvantaged class consists "only" of out-of-state corporations, no serious constitutional issue is presented.

In brushing aside BN's equal protection challenge, the court below gave pivotal importance to this Court's 1904 decision in *Snell*, an early and unsuccessful equal protection challenge to a very different state venue law. 193 U.S. at 36-37. The statute in question permitted the plaintiff to obtain a transfer of venue under certain circumstances, while a corporate defendant could not. *Id.* at 34. Thus, the legislative classification involved was one of individuals versus corporations (or perhaps, plaintiffs versus defendants). This Court denied the equal protection claim of the defendant corporation, observing in a passage quoted by the court below that "it is fundamental rights which the Fourteenth Amendment safeguards and not the mere forum which a State may see proper to designate . . . ." 193 U.S. at 36. In context, *Snell* may be read merely to mean that the legislative classification there was reasonable based on real differences between individuals and corporate defendants.[10]

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[10] Venue statutes inevitably involve some line-drawing, because the plaintiff (individual) will frequently want one forum and the defendant (corporation) another, and it is impossible for both to have their way. Making distinctions between plaintiffs and defendants may often have some reasonable basis.

In contrast, the statute at issue in this Court's 1927 *Saunders* decision was virtually identical to the one involved here. In *Saunders*, a domestic corporation could be sued only where it had a place of business or where its chief officer resided, but a foreign corporation could be sued in any county in the state. 274 U.S. at 492-93. The defendant, an Ohio corporation, conducted business in the state solely in Arkansas County, where it maintained a warehouse and had a designated agent for service of process. *Id.* at 491. When injured in the defendant's warehouse, the plaintiff sued elsewhere, in Saline County. *Id.*

The *Saunders* Court directly addressed the dicta in *Snell* about equal protection applying only to "fundamental rights," and categorically rejected the proposition that venue rights are "beyond the reach of the equal protection clause." 274 U.S. at 495-96.[11] The Court pronounced that the statutory venue discrimination against out-of-state corporations could be permitted only if "based on a real and substantial difference, having a reasonable relation to the subject of the particular legislation." *Id.* at 493 (citations omitted).[12] Under that standard, the Court struck down the Arkansas statute as violating equal protection: "there is no more reason for a statewide venue when the action is against a foreign corporation than when it is against a domestic corporation or natural person." *Id.* at 494. More specifically, the con-

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[11] The *Saunders* Court read *Snell* simply as a case in which the legislative classification had a rational and legitimate basis. 274 U.S. at 496. In another case decided shortly after *Saunders*, involving discrimination in venue as between individuals and corporations, the state law was upheld under equal protection analysis. *Bain Peanut v. Pinson*, 282 U.S. 499 (1931).

[12] In recent decisions in the equal protection field, particularly when discrimination is alleged by out-of-state residents, this Court has adhered to the requirement of a rational basis relating to a legitimate state interest. *E.g., Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869 (1985); *Western & Southern Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648 (1981).

stitutional protection in *Saunders* was extended to a party described as a "foreign corporation[] doing business within the state by her permission, and therefore having a fixed place of business therein and a resident agent on whom process may be served"—a description that fits BN exactly.[13]

In the decision below, the Montana Supreme Court not only sought to distinguish *Saunders*, but also questioned its continuing vitality. App. 11a. In particular, the court below appeared to read this Court's more recent decision in *Starnes* as having implicitly overruled *Saunders* and revived the sweeping language of *Snell*.

The statute in *Starnes* provided that, whereas out-of-state defendants could be sued in any county in the state, domestic corporations could be sued only in their county of residence—unless the plaintiff could make a preliminary showing as to his or her cause of action. 425 U.S. at 638. In *Starnes*, the out-of-state defendant had complained only of the effects of the statute's unequal application of the *prima facie* showing requirement, as a matter of pre-trial tactical maneuvering; the Court pointedly noted that defendant "does not challenge" the aspect of the venue statute authorizing "broader venue geographically for suits against foreign corporations than for suits against domestic corporations." *Id.* at 645-46. Thus, the issue presented in the present case was never raised in *Starnes*.

In response to the defendant's challenge to the unequal preliminary showing requirement, the Court in *Starnes* examined not only the language of the statute, but also the practical effects of its distinction between resident

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[13] *Id.* at 494; *see supra*, at 4. The only factual distinction between the two cases is of no consequence. In *Saunders*, the underlying action had been brought in a county in which the defendant corporation conducted no business. *Id.* at 491. That fact, however, was not treated as material: what was critical was the disparate treatment of resident and non-resident corporations. Thus, it is irrelevant here that BN conducts some business in Yellowstone County.

and non-resident corporations, observing that "[j]ust as a statute nondiscriminatory on its face may be grossly discriminatory in its operation, . . . so may a statute discriminatory on its face be nondiscriminatory in its operation." *Id.* at 645 (citations omitted). As it turned out, the showing required to be made by plaintiffs in cases against domestic corporations was merely a *prima facie* matter, quite easily satisfied in practice; on this basis, the Court found that there was no real and substantial discrimination against out-of-state corporations. *Id.* at 643-45. This result is easily reconciled with the holding in *Saunders*, where there was discrimination both on the face of the statute and in practice.

The Montana Supreme Court also attached substantial weight to a footnote in Justice Brennan's opinion for the Court in *Starnes*, questioning the continuing vitality of *Saunders*. *Id.* at 645 n.6 (dicta). But that footnote did not purport to reach the question whether *Saunders* was still good law, and certainly it did not overrule *Saunders*. In fact, Justice Brennan's footnote even indicated that equal protection would be violated by a state law providing that a domestic corporation could be sued only in its county of residence, but that an out-of-state corporation could be sued in any county in the state "without regard to whether the corporation maintained an agent there . . . ." *Id.* Since *Starnes*, this Court has cited *Saunders* as authority in an equal protection case, confirming that it remains good law. *See Western & S. Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. at 664-65.

Accordingly, the constellation of this Court's decisions fully supports the principles of *Saunders* that state court venue is subject to equal protection review and that state venue laws may not discriminate arbitrarily against out-of-state corporations. But there is sufficient tension in this Court's decisions to mislead the state courts, and the decision below typifies that confusion.

In this case, *the Montana Supreme Court never even attempted to identify a reasonable basis for the discrimination in the Montana venue statute against non-resident*

corporations. Relying on *Snell*, a dissent in *Saunders*, and Justice Brennan's open footnote in *Starnes*, the court below brushed aside the need to articulate any rational and legitimate basis for the statute's discrimination against out-of-state corporations. App. 9a. Instead, it concentrated on what it found to be the pro-plaintiff policy of the FELA, particularly with respect to the choice of forum. App. 9a-11a. That approach, of course, was entirely misdirected. The discrimination here is not one of plaintiffs versus defendants, or employees versus railroads—it is unequal treatment as between resident corporations and out-of-state corporations. Indeed, under the Montana venue statute, a FELA suit against a railroad resident in Montana could be filed only in the railroad's county of residence, while an identical suit against BN could be brought in any county.[14] Moreover, Montana's general venue statute is applicable to a whole range of civil cases, not only FELA cases.[15] In any event, the FELA provides no support for discrimination in venue against out-of-state railroads.[16] Thus, the court below sidestepped the real equal protection issue in this case.

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[14] This is not a purely hypothetical example. There are several railroads with their principal places of business in Montana, including Montana Rail Link and Rarus Railway.

[15] The holdings below in these FELA actions are consistent with prior decisions of the Montana Supreme Court in non-FELA actions. *See, e.g., Morgen & Oswood Constr. Co. v. United States Fidelity & Guar. Co.*, 167 Mont. 64, 535 P.2d 170 (1975); *Foley v. General Motors Corp.*, 159 Mont. 469, 499 P.2d 774 (1972); *Pue v. Northern Pac. Ry.*, 78 Mont. 40, 252 P. 313 (1926); *State ex rel. Mackey v. District Court, Fifth Dist.*, 40 Mont. 359, 106 P. 1098 (1910).

[16] The FELA itself does not discriminate in venue when an action is brought in federal court. 45 U.S.C. § 56 (1981). In addition, this Court has held that state court actions against FELA defendants should be governed by the same venue rules as all other actions in the state courts, not singled out for different treatment. *See Miles v. Illinois Cent. R.R.*, 315 U.S. 698, 703 (1942). Indeed, a state cannot discriminate between actions arising under a federal law, such as the FELA, and actions arising under state laws. *See McKnett v. St. Louis & S.F. Ry.*, 292 U.S. 230, 234 (1934).

The Montana Supreme Court also avoided the issue in other ways. For instance, the court found that there was no truly discriminatory effect in forcing BN to proceed in state court in Yellowstone County, in that the case could have been brought under the FELA in federal district court in Billings, Montana, which is also located in Yellowstone County. App. 15a. This strained analogy to *Starnes* fails. As noted above, the discrimination in the Montana venue statute exists regardless whether the action is under the FELA (or any other federal law providing for concurrent state and federal court jurisdiction). Equally important, the discrimination here subjects BN to extreme forum shopping *within the Montana court system.* The coincidence that the underlying action could also have been brought in federal court is beside the point. The federal court system was designed to minimize the effects of local bias against out-of-state defendants, and contains specific safeguards. Unlike Montana state court judges, who are elected locally for fixed terms of office, federal judges are appointed for life by the President, subject to the advice and consent of the Senate. The jury in federal court is also reflective of a wider geographic region. In the Yellowstone County state trial court, the jury venire is limited to Yellowstone County itself. In contrast, the jury venire for the Billings Division of the United States District Court for the District of Montana is drawn from Yellowstone and twenty-six other nearby counties.[17] In addition, a defendant in federal court has the right of appeal to the United States Court of Appeals for the Ninth Circuit, rather than to the Montana Supreme Court. For all of these reasons, the fortuity of concurrent federal jurisdiction does not alter the prejudice experienced by BN as an out-of-state corporation defending itself within the Montana judicial system.

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[17] D. Mont. R. 105-1 (1991) (specifying five divisions of the court).

Ultimately, the Montana Supreme Court failed to supply any meaningful rationale for the patent discrimination in the Montana venue statute—single county venue for cases against resident corporations, "any county" venue for cases against non-resident corporations. In one sense, that omission should perhaps not be surprising, since the statute was adopted in 1864, before Montana became a state and before passage of the Fourteenth Amendment.[18] The absence of explanation suggests that the statute is the product of nothing more than arbitrary and unwarranted localism. What should be of equal or greater concern to this Court, however, is that in the welter of confusion represented by the decision below, the court felt itself free to avoid even the most rudimentary equal protection review of such a discriminatory state law.

II. MONTANA'S DISCRIMINATION IN VENUE AGAINST NON-RESIDENT CORPORATIONS HAS REAL AND SUBSTANTIAL EFFECTS: IN PARTICULAR, NON-RESIDENT CORPORATIONS ARE SUBJECTED TO OPEN-ENDED FORUM SHOPPING FROM WHICH RESIDENT CORPORATIONS ARE LEGALLY IMMUNE UNDER STATE LAW

Everything about the Montana venue statute—its divided structure, its plain language, and its interpretation in case law—discriminates between domestic and non-resident corporations. Under MCA § 25-2-118, domestic corporations enjoy the privilege of being sued only in their county of selected residence. In contrast, out-of-state corporations may be sued in any county selected by the plaintiff. In the give and take of civil litigation, this inequality has tremendous impact.

This disparate treatment has two types of adverse effects on a multi-state business such as BN. First, the

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[18] The statute was re-worded slightly, without any substantive revision, in 1985. MCA § 25-2-118 (1989) (originally enacted as Sec. 20, p. 46, Bannack Stat., 1864; amended Sec. 8, Ch. 432, L. 1985; redesignated 25-2-118 by Code Commissioner, 1985).

out-of-state corporation must shoulder additional logistical burdens in state court litigation. Non-resident corporations, unlike domestic corporations, are unable to centralize their litigation in their county of residence or where accidents have occurred. In the underlying actions, if BN had been legally "resident" in Montana, it could have insisted on defending itself in its county of Montana headquarters, Hill County. Under such circumstances, BN would have been proceeding in a court to which it has ready and convenient access. As it is, purely because BN is based outside of Montana, it was forced to defend itself in a court in another county designated by the plaintiffs, across the state and nearly two hundred miles away.

Second, and even more important, under the Montana venue system, out-of-state corporations are subjected to open-ended forum shopping, whereas resident corporations are protected from this phenomenon. The quantitative impact of this disparity is heightened by the "open door" policy maintained by Montana.[19] Under the Montana judicial system, an out-of-state corporation may be hauled into court in any Montana county, by an out-of-state plaintiff, represented by out-of-state lawyers, to respond to allegations of an out-of-state injury.[20]

In fact, this is happening in a large number of cases brought against BN in Montana. The two underlying actions by Ford and Johnson are not isolated instances, but instead part of a much larger pattern of plaintiffs' litigation. BN's litigation docket over the period 1986 through the present shows that it is experiencing a torrent of FELA claims in just two Montana state

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[19] *See supra*, at 3-4 & note 3. Under Montana law, the doctrine of forum non conveniens is specifically not available to defendants in FELA actions, as it is to defendants to civil actions arising under state law. MCA § 25-2-201 (1987); *see Haug v. Burlington Northern R.R.*, 236 Mont. 368, 770 P.2d at 521 (citations omitted).

[20] A non-resident corporation can even be sued in a county in which it conducts *no* business.

courts.[21] Furthermore, some significant trends have emerged:

- The great majority of the FELA cases against BN in Montana state court, over 85 percent, have been filed in just two out of Montana's fifty-six counties, Yellowstone and Cascade. Of the total of 140 cases, all but 18 were brought in either Yellowstone County or Cascade County court.
- *Not a single case* filed in Yellowstone or Cascade County involved an alleged accident in the same county in which venue was laid. Furthermore, of the total of 122 cases in those two counties, only 10 were brought by a resident of the county of venue. Thus, over 90 percent of these cases presented no connection whatever to the county of venue.
- Fully ten percent of all of the cases (14 out of 140), have been brought by a plaintiff resident in Hill County, Montana, also alleging an injury in Hill County—the same Hill County in which BN has its principal place of business within Montana. Nonetheless, every one of these cases was filed in Cascade County.
- Many cases present no connection even to Montana. In over one-third of the cases against BN in Montana state court, both the plaintiff and the alleged injury are out-of-state—from Wyoming, Washington, North Dakota, South Dakota, Colorado, and Nebraska. In over 85 percent of those cases, even the plaintiffs' lawyers were from outside of Montana.[22]

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[21] List in the Appendix, at App. 27a, is the entire docket of FELA cases filed against BN in Montana state court, which were resolved (either by judgment or settlement) during the last six years, or which remain pending. Following that list, at App. 40a, is a table laying out salient features of those cases for purposes of this petition.

[22] Of 140 cases, 47 were brought by out-of-state plaintiffs for out-of-state injuries; in turn, of these 47 cases, all but 5 were brought in either Yellowstone or Cascade County district court. Of the total of 47 such cases, lead counsel was from out-of-state in 40 cases.

This data shows that plaintiffs are going out of their way to bring suit in selected Montana counties. In effect, the Yellowstone and Cascade County courts and their juries have become powerful magnets for FELA claims, drawing cases not only from all of Montana but from across the entire upper northwest region of the United States.

From all of the circumstances, it is manifest that BN is being subjected to a virulent form of forum shopping —one from which resident corporations are immunized by state law. The ultimate result of the Montana venue system is a blatant discrimination. The Montana corporation takes the defense with the guarantee of a "home field' advantage, in the county which it has selected as its residence. In contrast, the out-of-state corporation is compelled to defend itself in a court which has been selected by the plaintiff—after a multi-state forum-shopping exercise—as the one in which the largest jury verdict is likely to be obtained. As this case perfectly demonstrates, litigants are skillfully exploiting the discriminatory provisions of the Montana venue statute.

That the discrimination involves "only" the venue of a legal proceeding does not diminish its gravity in the least. Indeed, discrimination in the legal process itself is even more serious than the type of discrimination which may result from arbitrary line-drawing in substantive legislation. The courts, state courts included, are expected to serve as the instruments of substantive justice and as the protectors of constitutional rights. As this Court observed in another equal protection context just last Term:

> [T]he injury caused by the discrimination is made more severe because the government permits it to occur within the courthouse itself. Few places are a more real expression of the constitutional authority of the government than a courtroom, where the law itself unfolds.[23]

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[23] *Edmonson v. Leesville Concrete Co.*, 111 S. Ct. 2077, 2087 (1991) (declaring unconstitutional racially discriminatory use of

Discrimination at the courthouse door opens up the possibility of myriad other forms of bias, perhaps subtler but no less real. Thus, inequality in the judicial process, more than in any other branch of government, has a corrosive effect on the rule of law.

Here, litigants are using the discriminatory provisions of Montana law to achieve tactical advantages against non-resident corporations. When discrimination runs against out-of-state litigants, it is especially offensive to our constitutional system. A state should not be permitted to manipulate the opening and closing of its courts so as to confer an advantage to its own corporations over out-of-state businesses. State laws which subject outsiders to unequal treatment invite imitation, or perhaps even worse, retaliation. This Court has not hesitated to strike down state laws, under the Equal Protection Clause, when they discriminate against out-of-state corporations.[24] By close analogy, the Court has

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peremptory jury strikes in civil litigation). This Court also declared last Term that "[t]he Fourteenth Amendment's mandate that race discrimination be eliminated from all acts and proceedings of the State is *most compelling in the judicial system.*" *Powers v. Ohio*, 111 S. Ct. 1364, 1373 (1991) (emphasis added) (race-based use of peremptory jury strikes in criminal case).

[24] *See, e.g., Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869, 883 (1985) (state law imposing a lower gross premiums tax rate on domestic insurance companies than on foreign insurance companies violates the Equal Protection Clause); *WHYY, Inc. v. Borough of Glassboro*, 393 U.S. 117, 119-20 (1968) (state law granting a property tax exemption to domestic nonprofit corporations but denying the exemption to foreign nonprofit corporations solely because of their foreign incorporation violates the Equal Protection Clause); *Wheeling Steel Corp. v. Glander*, 337 U.S. 562, 574 (1949) (foreign corporations were denied equal protection where the state imposed an ad valorem tax on their notes and accounts receivable from sales within the state, but did not impose the same tax on domestic corporations); *Hanover Fire Ins. Co. v. Harding*, 272 U.S. 494, 516 (1926) (equal protection violated where state imposed a tax on the net local receipts of foreign corporations at a higher rate than domestic corporations); *Southern Ry. v. Greene*, 216 U.S. 400, 418 (1910) (requiring foreign corporations

also been concerned with the lack of equal protection in state laws which effect disparate treatment as between long-time residents and relative newcomers.[25]

Constitutional law serves as a vital restraint with respect to legislation of this character. A non-resident may be the prime example of someone whose interests should not be entrusted solely to the political processes and judgments of a state legislature.[26] Where political representation is lacking, it is all too easy for state legislators to single out the unrepresented class of persons for disadvantageous treatment.

Accordingly, this case presents an example of real and substantial discrimination against non-residents. Plaintiffs who take out-of-state corporations to court in Montana can take free advantage of idiosyncrasies in the bench and jury venire in selected county courts. In Montana and other states with venue statutes that discriminate against large out-of-state corporations, the result can only be to exacerbate the exploding volume and cost of civil litigation.

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to pay an additional franchise tax that was not required to be paid by domestic corporations violates the Equal Protection Clause).

[25] *See, e.g., Attorney Gen. of New York v. Soto-Lopez*, 476 U.S. 898, 911-12 (1986) (prior residence requirement of New York's civil service veterans' preference statute violates equal protection); *Hooper v. Bernalillo County Assessor*, 472 U.S. 612, 624 (1985) (equal protection violated where statute provided tax exemption only for those Vietnam veterans who were state residents prior to May 1976); *Williams v. Vermont*, 472 U.S. 14, 27 (1985) (state statute granting a use tax credit to automobile registrants only if they were state residents at the time the use tax was paid violated equal protection); *Zobel v. Williams*, 457 U.S. 55, 64-65 (1982) (state statute distributing dividend benefits based upon a recipient's years of residency violates equal protection).

[26] *Cf. United States v. Carolene Prods. Co.*, 304 U.S. 144, 152-53 n.4 (1938) (citations omitted); *see* John H. Ely, *Democracy and Distrust: A Theory of Judicial Review*, 82-84 (1980).

III. STATE SUPREME COURTS ARE DIVIDED OVER WHETHER EQUAL PROTECTION IS VIOLATED WHEN A VENUE STATUTE DISCRIMINATES BETWEEN RESIDENT AND NON-RESIDENT CORPORATIONS

Lacking definitive guidance from this Court, state supreme courts remain split as to whether discrimination in state court venue against out-of-state corporations violates equal protection. Many states, of course, do not discriminate. In the dozen or so states in which venue statutes have been challenged as unconstitutionally discriminatory against non-resident corporations, however, the state supreme courts have reached widely divergent results.

Three state supreme courts, relying on this Court's decision in *Saunders*, have struck down state venue laws because of their disparate treatment of resident and non-resident corporate defendants. In 1977, the Arkansas Supreme Court held such a statute unconstitutional. *Philco-Ford Corp. v. Holland*, 548 S.W.2d 828, 829 (Ark. 1977) (citing *Saunders*, subsequent to the *Starnes* decision).[27] Likewise, in *Windham v. Pace*, 6 S.E.2d 270 (S.C. 1939), the South Carolina Supreme Court struck down a venue statute providing that although a domestic motor carrier corporation could be sued only in a county in which it operated, a non-resident motor carrier corporation could be sued in any county in the state. Finding the distinction to be arbitrary, the court observed that "[t]here is no real distinction, we think, between domestic and foreign motor carriers . . . ." *Id.* at 273. Faced with a Kentucky venue statute closely comparable to the one in *Windham*, the Court of Appeals of Kentucky

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[27] The venue statute at issue in *Philco-Ford* was for contract actions; it discriminated between resident and non-resident corporations by providing that while resident corporations could be sued only in their county of residence, non-resident corporations could be sued in any county in which the plaintiff resided.

also declared it unconstitutional. *Henry Fisher Packing Co. v. Mattox*, 90 S.W.2d 70 (Ky. 1936).

Other state supreme courts have recognized but avoided the constitutional issue through statutory construction. As in the case below, these courts were confronted with venue statutes which discriminated against non-resident corporations by permitting a broader choice of forum against them than against resident corporations. Interpreting the applicable state laws, these courts have found that out-of-state corporations may acquire "resident" status, for venue purposes, through acts such as maintaining a place of business in the state and designating an agent for service of process.[28] States falling into this category include California, Georgia, Idaho, Kentucky, Minnesota, Mississippi, Missouri, and North Carolina.[29] Such an interpretation often has been prompted by a desire to avoid a reading of the statute that would risk violating equal protection and this Court's decision in *Saunders*.[30]

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[28] The Montana Supreme Court was invited to take this approach, but declined. App. 5a-6a. Decisions which eliminate the constitutional issue through statutory construction are the true analogy to *Starnes*, in which the statute was discriminatory on its face but no discrimination was found in the actual operation of the statute. If an out-of-state corporation may, through reasonable measures, place itself in the same position as a resident corporation for venue purposes, then no real discrimination will result.

[29] *Banning v. Minidoka Irrig. Dist.*, 406 P.2d 802 (Idaho 1965); *State ex rel. Bowden v. Jensen*, 359 S.W.2d 343 (Mo. 1962); *Commercial Carriers, Inc. v. Matracia*, 311 S.W.2d 565 (Ky. 1958); *Hale v. Bohannon*, 241 P.2d 4 (Cal. 1952) (en banc); *Smith v. Utah Home Fire Ins. Co.*, 47 N.W.2d 785 (Minn. 1951); *Hill v. Atlantic Greyhound Corp.*, 51 S.E.2d 183 (N.C. 1949); *Forman v. Mississippi Publishers Corp.*, 14 So. 2d 344 (Miss. 1943); *Hirsch v. Shepherd Lumber Corp.*, 20 S.E.2d 575 (Ga. 1942); *Sandford v. Dixie Constr. Co.*, 128 So. 887 (Miss. 1930). *See also Zolper* v. *AT&T Info. Sys., Inc.*, 709 S.W.2d 74 (Ark. 1986) (different statute than the one in *Saunders*).

[30] *See Banning*, 406 P.2d at 804; *Utah Home Fire Ins.*, 47 N.W.2d at 787-88 & n.2; *Hirsch*, 20 S.E.2d at 577; *Sandford*, 128

In effect, then, these states abide by the principles announced by this Court in that case.[31]

Still other state supreme courts, however, like the Montana court, have found no constitutional defect in venue statutes that discriminate between resident and nonresident corporate defendants. Two state supreme courts have upheld venue statutes virtually identical to the Montana statute discriminating against out-of-state corporations.[32] Other state courts have upheld venue statutes which allowed suit against *individual* nonresident defendants in any county designated by the plaintiff, whereas venue against residents was far more restricted.[33]

So. at 889; *see also Zolper*, 709 S.W.2d at 76. In addition, in *Hale v. Bohannon*, the California Supreme Court upheld part of a lower court decision, *Bohn v. Better Biscuits, Inc.*, 78 P.2d 1177, 1180-83 (Cal. Ct. App. 1938), which had interpreted the relevant venue provisions as applying equally to foreign and domestic corporations, expressly due to the equal protection considerations raised in *Saunders*.

[31] Either out of concern for constitutional equal protection, or perhaps for simple reasons of fairness, a number of states with venue statutes like the one presented here also provide *by statute* that an out-of-state corporation may acquire a particular residence for purposes of state court venue. Maine, Me. Rev. Stat. Ann. tit. 4, § 155 (West 1989); Nebraska, Neb. Rev. Stat. § 25-403.02 (1989); and Oregon, Or. Rev. Stat. § 14.080 (1989).

[32] *Commercial Ins. Co. v. Adams*, 366 S.W.2d 801 (Tex. Civ. App.), *aff'd*, 369 S.W.2d 927 (Tex. 1963) (upholding statute providing that despite different treatment of domestic corporations, a foreign corporation may be sued in any county in which it maintains an agent or representative throughout the state). *State ex rel. Blackledge v. Latourette*, 205 P.2d 849 (Or. 1949) (upholding statute providing that for tort actions, resident defendants must be sued in the county where the cause of action arose, or where they reside, but non-resident defendants may be sued anywhere in the state).

[33] *Conner v. Willet*, 91 So. 2d 225 (Ala. 1956) (even though venue against resident individual defendants was restricted, non-resident individual defendants could be sued in any county in the state);

In other cases involving various other forms of venue discrimination against non-residents, courts have also declined to find any equal protection violation.[34] Finally, a number of states have venue laws which have not yet been brought under equal protection scrutiny, but which discriminate on their face in favor of resident and against non-resident corporations.[35]

From the preceding array, two points emerge. First, not only the Montana Supreme Court, but also a number of other state courts, are prepared to condone state venue laws which treat resident and non-resident corporations unequally. Second, state courts on all sides of the ques-

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Alcarese v. Stinger, 78 A.2d 651 (Md. 1951) (although venue against resident individual defendants was restricted, venue against non-resident individual defendants was unrestricted); and *Panzram v. O'Donnell*, 48 F. Supp. 74 (S.D. Minn. 1942) (actions must be brought against resident defendants where they reside, but may be brought against non-residents in any county in the state).

[34] *See, e.g., Aetna Fin. Co. v. Gutierrez*, 632 P.2d 1176 (N.M. 1981) (different treatment afforded foreign and resident corporations in venue statute did not violate equal protection); *Lane v. Hughes*, 408 P.2d 281 (Okla. 1965) (non-resident motorist venue provisions constitutional even though they provide for wider venue against foreign defendants than for resident defendants); *Wilson & Co. v. Hickey*, 97 P.2d 564 (Okla. 1939) (discriminatory treatment against foreign corporation in venue statute held constitutional); *Phillips Petroleum Co. v. Smith*, 61 P.2d 184 (Okla. 1936) (venue statute allowing suit against foreign corporations in more counties than against domestic corporations not unconstitutional).

[35] These states include Alabama, Ala. Code § 6-3-7 (1990); Arizona, Ariz. Rev. Stat. Ann. § 12-401 (West Supp. 1990); Colorado, Colo. R. Civ. P. R. 98 (1990); Florida, Fla. Stat. Ann. § 47.051 (Harrison 1988); Iowa, Iowa Code Ann. § 616.17 (West 1950); New Hampshire, N.H. Rev. Stat. Ann. § 507:9 (1983); Nevada, Nev. Rev. Stat. Ann. § 13.040 (Michie 1987); North Dakota, N.D. Cent. Code § 28-04-04 (1991); Rhode Island, R.I. Gen. Laws §§ 9-4-4, 9-4-5 (1985); South Dakota, S.D. Codified Laws Ann. § 15-5-6 (Supp. 1991); Tennessee, Tenn. Code Ann. § 20-4-106 (1980); Vermont, Vt. Stat. Ann. tit. 12, § 402 (1973); West Virginia, W. Va. Code § 56-1-1 (Supp. 1991); and Wyoming, Wyo. Stat. § 1-5-107 (1991).

tion have found support for their positions in the various decisions of this Court, including *Snell*, *Saunders*, and *Starnes*.[36] The decision below, which in effect treated *Saunders* as having been overruled, is but one example of the disarray. Such a situation, in which controlling Supreme Court authority on a constitutional issue is being disregarded or misapprehended, demands rectification.

As the case law demonstrates, the application of the Equal Protection Clause to matters of state venue law has been permitted to percolate at least since the *Saunders* decision in 1927. At this point, it seems unlikely that the state courts will be able to focus the relevant issues any more clearly. Indeed, if anything, these courts appear to be becoming less certain of themselves in this area—seeming to perceive conflicting results in this Court's past decisions. The state courts therefore appear to be unable consistently to identify the gross discrimination worked by such statutes against out-of-state corporations, or to curb the abusive forum shopping to which this disfavored class of defendants is being subjected.

Because these issues of state venue law almost always arise in the state courts, there is little or no chance that the question presented can be resolved by the federal courts of appeals. Accordingly, it is left to this Court to

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[36] *See* cases cited *supra*, nn. 29, 32-34. Indeed, many state court decisions have seized on only one or two of this Court's decisions in the area, without making any attempt to reconcile the line of cases as a whole. *See, e.g., Kellis v. Farber*, 523 So. 2d 843, 847-48 (La. 1988) (cites *Snell* to the effect that there is no constitutionally protected right to be sued in one forum over another, without citing *Saunders*); *Plantation Legal Defense Servs., Inc. v. O'Brien*, 401 A.2d 1277, 1279 (R.I. 1979) (follows *Snell* in holding that equal protection not violated by choice of forum if "equal laws equally administered," without citing *Saunders*); *State of Wisconsin ex rel. Steeps v. Hanson*, 80 N.W.2d 812, 815 (Wis. 1957) (quotes *Snell* at length as dispositive of equal protection challenge to venue statute, without citing *Saunders*); *see also Smith v. Utah Home Fire Ins. Co.*, 47 N.W.2d at 787-88 (makes equal protection analysis without referring to any Supreme Court precedent).

settle the question conclusively, and to rule that state venue laws may not discriminate in favor of resident corporations and against out-of-state corporations.

CONCLUSION

For these reasons a writ of certiorari should issue and the decision and order of the Supreme Court of the State of Montana should be reversed.

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